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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DOSS, Defendant and Appellant.	2d Crim. No. B228820 (Super. Ct. No. NA065349) (Los Angeles County)

Michael Doss appeals the judgment following his conviction for first degree murder. (Pen. Code, §§ 187/189.)[1] The jury found to be true an allegation that he personally used a deadly weapon in the commission of the murder (§ 12022, subd. (b)(1)), and the trial court found that he had two prior convictions and had served one prison term within the meaning of section 667.5, subdivision (b). He was sentenced to 27 years to life. Doss contends the trial court erred in admitting a pre-death and autopsy photographs of the victim, in instructing the jury on the liability of an aider and abettor, and in failing to instruct the jury on imperfect self-defense. He also claims the trial court failed to adequately consider a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Raleigh Grigsby was released from prison in March 2005. Shortly thereafter he contacted Terry Barker. Doss, Grigsby, and Barker had been close friends for many years. Barker was Doss's former girlfriend and the mother of his daughter.

On the morning of April 12, 2005, Barker drove Grigsby to a homeless encampment where Doss was living. Doss and Grigsby then went to the business of William Harris. Harris had an automobile shop in Long Beach called Camera View Vehicles. While in prison, Grigsby knew fellow inmate James Schuetze who was serving a term for a 2002 assault of William Harris. Grigsby and Schuetze had spoken about that offense and a grudge Schuetze had against Harris.

Shortly before noon on April 12, 2005, Robin Marietta saw Doss and Grigsby waiting for Harris at Harris's shop. Marietta owned a business next door. When Harris arrived, he went into his shop with Doss and Grigsby. Marietta heard screaming inside Harris's shop, ran in that direction, and heard Harris yell for help. Harris had come out of his shop and Marietta saw him trying to open a security gate. Doss and Grigsby were on top of him. One was stabbing Harris and the other was hitting him with a fire extinguisher.

Marietta yelled for her coworker, Greg Lord, to assist Harris and Lord was able to get the key to the security gate from Harris while Doss and Grigsby continued their attack. When Marietta ran around the corner to call 911, Doss came up next to her holding a fire extinguisher and a gun. Doss aimed the gun at her and demanded her cell phone. She pushed the gun away and ran. Doss ran in another direction. Marietta saw others helping Harris outside his shop.

When police arrived, Marietta identified Doss in a field show-up and told police she saw Doss both hitting Harris with the fire extinguisher and stabbing him in the back. At trial, however, Marietta was unable to identify Doss. She also testified that she did not know which of the two men stabbed Harris.

Witness Jorge Rodriguez was driving his car near Harris's shop when he saw Doss and a second man trying to prevent Harris from leaving the building and that

both Doss and the other man were stabbing him as the fight continued outside. Another witness heard Harris calling for the police and stating that, "they are stabbing me."

Harris was taken to a hospital where he died from multiple stab wounds. He also suffered several blunt force injuries.

Doss was arrested shortly after the murder near Cavanaugh Machine Works, a business in the same neighborhood as Harris's shop. Doss was bleeding, and had a piece of clothing wrapped around a cut on his head. He changed his clothes and was wearing clothing he had found on the Cavanaugh Machine Works premises. Police found a knife, a two-way radio, gloves, handcuffs, and blood-stained clothing in a trash can at Cavanaugh's. Harris's blood was found on clothing and elsewhere at both Cavanaugh's and another place of business in the neighborhood.

Doss testified on his own behalf. He testified that he saw Grigsby, whom he had known for 19 years, on the day of the killing. Grigsby told Doss that he wanted to beat up Harris due to a prior grievance. Doss was not interested in doing that, but agreed to go to Harris's place of business with Grigsby to look at cars. Once there, Doss and Grigsby discussed cars with Harris.

Doss testified that, when Harris found out they did not have the money to buy a car, Harris became angry, freaked out, and hit Doss with a fire extinguisher. Doss testified that he grabbed the fire extinguisher from Harris and hit Harris with it. Grigsby entered the fray and tackled Harris. All three men fell to the ground, struggling. Harris called for help. Doss testified that Grigsby hit Harris in the chest with a knife and stabbed him repeatedly. Doss told Grigsby to stop stabbing Harris. Harris hit Doss in the head with the fire extinguisher and Grigsby stabbed Harris in the head. Doss tried to stand between Grigsby and Harris but, when Harris came running at them, Doss hit Harris with the fire extinguisher.

All three men ran out of Harris's shop to a security gate outside. Doss testified that he tried to take Marietta's cell phone so that he could call 911, and ran away when he could not seize the phone. He ran into the Cavanaugh Machine Shop, cleaned himself up, and changed into clothes he found in the shop. Doss told police that he had

been hit with a fire extinguisher, but did not mention any involvement with Harris. He admitted that he had brought two knives with him to the murder scene, and that he had disguised his appearance.

No Prejudicial Error in Admission of Victim Photographs

Doss contends the trial court abused its discretion by admitting a photograph of Harris taken prior to his murder, as well as a series of autopsy photographs. Doss argues that the photographs were irrelevant and that any probative value was substantially outweighed by the prejudicial effect of the photographs. (Evid. Code, § 352.)

Photographs of the victim of a crime may be admitted only if they are relevant to a material issue in the case and, even if relevant, may be excluded when probative value is clearly outweighed by prejudicial effect. (*People v. Dennis* (1998) 17 Cal.4th 468, 539.) The possibility that a relevant photograph may generate sympathy for the victim, however, does not require its exclusion. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230; see also *People v. Martinez* (2003) 31 Cal.4th 673, 692.) The admission of photographs of a victim lies within the broad discretion of the trial court. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1247-1248; *People v. Hughes* (2002) 27 Cal.4th 287, 336.) We conclude there was no abuse of discretion in the admission of any of the photographs in this case.

The trial court admitted a photograph of Harris taken while he was alive and showing him seated on a couch with two young children. The photograph was shown to the jury during opening argument and to certain witnesses during their trial testimony. Photographs of murder victims while alive are admissible only if their relevance to a material issue in dispute is established. (*People v. DeSantis, supra,* 2 Cal.4th at p. 1230; see also *People v. Martinez, supra,* 31 Cal.4th at p. 692.) Doss claims the photograph was irrelevant because the identity of the victim and participation of Doss in the fight were undisputed. He also claims any probative value in admission of the photograph was outweighed by its prejudicial effect.

Although allowing the photograph to be shown to the jury during opening argument was questionable, the photograph was relevant to assist witnesses in the identification of Harris during the extended physical attack that resulted in his death. There was no dispute that Harris was the murdered person, but the specific actions of Harris, Doss and Grigsby during the attack were relevant to the ferocity of the fighting and whether Harris was an aggressor or trying to escape. Also, a witness's identification of glasses found at the murder scene as the same as those worn by Harris in the photograph adds to the relevance of the photograph. In addition, for the same reasons the probative value of the photograph outweighed the possibility that it might generate sympathy for the victim.

Moreover, there is no basis to conclude that the prejudicial effect of the photograph substantially outweighed its probative value. (See *People v. DeSantis*, *supra*, 2 Cal.4th at p. 1230.) The photograph showed Harris in a pleasant and sympathetic setting but not in a manner likely to arouse the emotions of the jury beyond what would be inevitable when a life is suddenly ended.

Even if the photograph is considered irrelevant, any error in its admission was harmless. Despite Doss's claims to the contrary, this was not a close case where sympathy for the victim could have influenced the verdict. The evidence of Doss's ferocious attack on Harris was overwhelming and largely undisputed by Doss's own testimony. (See *People v. Hendricks* (1987) 43 Cal.3d 584, 594-595.)

Doss also contends the trial court abused its discretion in admitting autopsy photographs of Harris. Autopsy photographs of a murder victim are always relevant at trial to prove how the crime occurred. (*People v. Carey* (2007) 41 Cal.4th 109, 127.) The prosecution is not obliged to prove the details of the crime solely from the testimony of live witnesses, and a jury is "entitled to see how the physical details of the scene and body supported the prosecution theory" of the crime. (*People v. Davis* (2009) 46 Cal.4th 539, 615.) The photographs in this case reflect the extent of the attack which was probative to prove malice, and negated Doss's assertion that he was only defending himself. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1283.)

No Prejudicial Error in Aider and Abettor Liability Instruction

Doss contends the trial court erred in instructing the jury that the direct perpetrator and aider and abettor of a murder must be found "equally guilty" of the offense. We conclude that any error was harmless beyond a reasonable doubt.

When a person aids and abets another in committing a murder, that person's guilt is determined by his or her own mental state, and an aider and abettor can be found guilty of a lesser or greater offense than the direct perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117, 1122; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164.) In *Samaniego*, the court concluded that, although an instruction that a direct perpetrator and aider and abettor are "equally guilty" is generally correct, it can be misleading in some cases because it fails to state that an aider and abettor can be convicted of first degree murder only if he or she had the mental state required for that offense. (*Samaniego*, at pp. 1164-1165; see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518.)

The standard form of the 2009 version of CALJIC No. 3.00 used in the instant case included the potentially misleading "equally guilty" language.[2] At the time of trial, Doss proposed a revision to comply with the dictates of the then very recent *Samaniego* case. The trial court agreed and modified the instruction to provide that a direct perpetrator and aider and abettor are "equally guilty or equally guilty of any lesser included offense."

Doss contends that the instruction was misleading despite the modification because it still indicated that an aider and abettor's guilt must be equal to that of the direct perpetrator even though their equal guilt may be to a lesser offense than the charged offense. We agree that the modification did not correct the problem. But, we conclude that any error was invited by Doss and, in addition, could not have affected the verdict.

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[2] In 2010, CALJIC No. 3.00 was revised to eliminate the "equally guilty" language in accordance with the dictates of *People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1164-1165.

The doctrine of invited error prevents a defendant from challenging a trial court error on appeal when the error was caused by an intentional act by defense counsel made for a tactical reason. (*People v. Coffman* (2004) 34 Cal.4th 1, 49.) As applied here, a defendant cannot claim instructional error when the defendant made a deliberate choice to request the challenged instruction. (*Ibid*.)

Doss claims that defense counsel did not suggest or draft the actual modification to CALJIC No. 3.00 given to the jury. The record shows otherwise. Defense counsel raised the issue and proposed a modification to the instruction. The trial court then repeated the language proposed by the defense with a slight change and asked defense counsel if that was his proposal. Defense counsel answered, "Yes." Doss's proposed modification was offered for the tactical reason of clarifying CALJIC No. 3.00 in a manner that was potentially favorable to Doss.

Doss claims that, because the modification given to the jury was poorly conceived and insufficient, there could be no tactical reason for approving it. There is authority that the invited error doctrine does not apply when the error is based on mistake or ignorance. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1330; *People v. Valdez* (2004) 32 Cal.4th 73, 115–116.) But, here, defense counsel did not agree to an erroneous instruction without thought. He intentionally proposed his modification to benefit Doss.

We are mindful, however, that a trial court has a duty to assure the jury is properly instructed, and do not rest our decision solely on invited error. We conclude that, even if the claim were preserved for appeal, there was no error. The "equally guilty" language regarding aider and abettor liability is generally correct and misleading only under exceptional circumstances. (*People v. Samaniego, supra*, 172 Cal.App.4th at pp. 1163-1165.) This is not an exceptional case and any error was harmless under either the California reasonable probability test or the federal beyond a reasonable doubt test. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24; see *Samaniego,* at p. 1165; *People v. Nero, supra*, 181 Cal.App.4th at pp. 518-519.)

The evidence unequivocally shows that Doss and Grigsby approached Harris pursuant to a prior plan, and jointly beat him to death with a knife and a fire extinguisher. There could be no reasonable doubt that they were equally guilty of any crime the jury found to have been committed. In addition, the jury was properly instructed on the elements of the offense, including the required mental state and, based on these instructions, necessarily found that Doss acted with the mental state required for first degree murder.

The jury was instructed with CALJIC No. 3.01 which explained that, the People had to prove an aider and abettor intended to commit the crime, and with CALJIC Nos. 8.10, 8.11, and 8.20 which set forth the requirement of malice aforethought and of the premeditation and deliberation for first degree murder. By convicting Doss of first degree murder under these instructions, the jury necessarily found that he acted, either on his own or as an aider and abettor, with the mental state required for first degree murder.

No Error in Refusing to Instruct on Unreasonable Self-Defense

Doss contends the trial court erred by failing to instruct the jury on the lesser included offense of voluntary manslaughter based on an unreasonable self-defense theory. We conclude that there was no substantial evidence that Doss acted in unreasonable self-defense and, therefore, no error in failing to give the instruction.

A trial court must instruct on a necessarily included offense where there is substantial evidence from which a reasonable jury could conclude that the defendant committed the lesser offense and not the offense charged. (*People v. DePriest* (2007) 42 Cal.4th 1, 50; *People v. Breverman* (1998) 19 Cal.4th 142, 162.) Substantial evidence is "evidence that a reasonable jury would find persuasive" that the lesser offense was committed, but not the greater. (*People v. Wilson* (2008) 43 Cal.4th 1, 16.) An instruction is not required when the evidence is minimal or speculative. (*People v. Moye* (2009) 47 Cal.4th 537, 553; *People v. Gray* (2005) 37 Cal.4th 168, 219.)

As relevant to the instant case, voluntary manslaughter is an unlawful killing without malice when the killer acted with an actual but unreasonable belief in the need for self-defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) To warrant

instruction on unreasonable self-defense, there must be evidence from which the jury could find that the defendant actually believed he or she was in "imminent danger of death or great bodily injury." (*In re Christian S.* (1994) 7 Cal.4th 768, 771; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1263.) An imminent danger is one that "must be instantly dealt with." (*Christian S.,* at p. 783.)

Here, the trial court gave an instruction on self-defense and, as Doss argues, generally an instruction on unreasonable self-defense will be given with a "reasonable" self-defense instruction. Nevertheless, in this case there was no substantial evidence to support either self-defense or unreasonable self-defense. The evidence shows that Doss and Grigsby, who were armed, approached the unarmed Harris. In particular, evidence shows that Doss came with two knives as well as a two-way radio, gloves and handcuffs, all of which indicates a planned attack.

A fight ensued during which Harris was outnumbered two to one. Harris was beaten with a fire extinguisher and stabbed with a knife. There is evidence that Harris was able to hit Doss with the fire extinguisher at least once and was able to get out of his shop into an open area. But, based on undisputed witness testimony, Doss and Grigsby continued to beat and stab Harris as Harris tried to escape. Doss and Grigsby did not stop their attack until they saw witnesses in the area. Even if, as Doss testified, Harris was aggressive at the outset, there is no evidence that Harris ever placed Doss in imminent fear for his life or safety. There were always two men against one and Doss always had the option of withdrawal without risk of injury. And, after Harris escaped from his shop into the open area, Doss and Grigsby continued the attack with no basis whatsoever to fear for their safety.

No Error Regarding Marsden Motion

At his sentencing hearing, Doss submitted a motion for new trial, petition for writ of habeas corpus and a purported *Marsden* motion he had written himself without assistance of counsel. The court received his handwritten papers, and gave Doss an opportunity to argue the contentions raised therein. Doss declined the opportunity,

relying solely on his written papers. The trial court denied the motions and writ petition. The court did not expressly identify the *Marsden* motion in its ruling.

Doss contends the trial court erred in failing to conduct a hearing on his *Marsden* motion and, although he does not challenge their denial, further contends that the court should have considered the ineffective assistance of counsel claim raised in his new trial motion and writ petition. We disagree.

Under *Marsden*, a defendant is entitled to new counsel when appointed counsel is not providing adequate representation, or there is an irreconcilable conflict between defendant and counsel. (*People v. Abilez* (2007) 41 Cal.4th 472, 488; *People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) The defendant must make a substantial good faith effort to work out any disagreements with counsel. (*Barnett,* at p. 1086.) In considering a *Marsden* motion, the trial court must allow the defendant to explain the basis of the motion and relate instances of counsel's inadequate performance. (*Abilez,* at pp. 487-488.)

Here, Doss's motion was entitled motion for pro per status or *Marsden* hearing. The motion did not claim any conflict with counsel or ineffective representation which would have required a separate *Marsden* hearing. In fact, the only matter mentioned in the motion was a request for access to a law library. Such a request would be consistent with a *Faretta* motion, but Doss never requested self-representation and the matter is not raised on appeal. (See *Faretta v. California* (1975) 422 U.S. 806.)

The thrust of Doss's argument on appeal is that the claim of ineffective assistance of counsel in his new trial motion should have been treated as an argument in support of a *Marsden* request for new counsel. Based on the record, the trial court did consider and rule on his ineffective assistance claim. In addition, a new trial motion may be based on ineffective assistance of counsel only when it can be decided on the basis of the trial court's observation of counsel's performance at trial. (*People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Here, the trial court could not consider a claim based on conduct not

shown on the record and, of course, Doss retains the right to challenge the performance of trial counsel in a timely petition for writ of habeas corpus.

Doss also claims cumulative error. Because we have concluded that all his claims of error are meritless or harmless, there is no cumulative error. (*People v. Avila* (2006) 38 Cal.4th 491, 608.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Gary J. Ferrari, Judge

Superior Court County of Los Angeles

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

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